

Maybank v Cheo Ai Mee & Anor

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HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL
REVIEW NO R1–25–179 OF 2009

AZIAH ALI J

25 JANUARY 2010

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*Administrative Law — Remedies — Judicial review — Decision by IC —
Dismissal without just cause and excuse — Whether award of IC should be quashed*

C

*Labour Law — Employment — Dismissal — Constructive dismissal — Transfer
of first respondent to applicant's head office — Whether transfer was mala fide —
Industrial Court ('IC') — Whether IC erred when it concluded that applicant's
conduct was fundamental breach of first respondent's contract of employment —
Whether IC failed to consider relevant matters — Whether IC gave undue weight
to irrelevant matters*

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On 1 November 1999, a case of manipulation of two savings accounts, namely the savings account of Tai Chong Realty (M) Sdn Bhd ('the TCR account') and a joint and savings account in the names of Cheo Aimee ('the first respondent') and her mother, occurred at the Melaka branch of the Maybank ('the applicant'). When the first respondent, a Class II bank officer of the applicant bank, discovered that her bank balance was RM2,055.54 instead of RM551.68, she reported this discrepancy to the assistant branch manager of the applicant bank. The investigations made showed, inter alia, that two unauthorised transfers of funds amounting to RM12,000 had been made from the TCR account and that subsequent to this a series of withdrawals amounting to a total of RM10,500 were made from the first respondent's joint savings account. An investigation was then carried out by the applicant's audit team ('the audit team') and as a result show cause letters dated 26 May 2000 were issued to all the officers and staff involved in the said manipulation of the two accounts, including the first respondent. When the first respondent denied the allegations made in the show cause letter issued to her, no further action was taken against her. However, the applicant issued a letter to the first respondent to inform her of her transfer to the Credit Control HP Department at the applicant's head office with effect from 10 July 2000. The first respondent declined the transfer to another department because she was of the view that the transfer was made not for business or operational need but with a collateral purpose to punish her and was actuated by victimisation. The first respondent also declined the transfer because it would cause her undue hardship. Although the applicant postponed the transfer date, it maintained the transfer directive on the grounds that it was based on the recommendation of the audit team.

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- A The first respondent, on the other hand, considered the confirmation of her transfer as an act of constructive dismissal to victimise her because of suspicion and allegations. This dispute between the first respondent and the applicant was referred to the Industrial Court ('the IC'), the second respondent, for adjudication. The IC found that the decision to transfer the first respondent
- B was not bona fide but was effected to punish the first respondent and that the report of the audit team was unfair and biased. Thus, by its award dated 31 March 2009 the IC found that the first respondent was dismissed by the applicant without just cause and excuse and allowed her claim for reinstatement without loss of financial benefits. This was the applicant's
- C application for a judicial review of that decision. By way of this application the applicant sought an order of certiorari to quash that award. The applicant submitted that the show cause letter issued to the first respondent was part of the applicant's investigation process to accord her an opportunity to provide an explanation before it could decide whether to charge her. It was the applicant's
- D contention that the IC had erred in giving too much weight to the manner in which the audit team conducted its investigation into the alleged fraud and by failing to take into consideration the more relevant matters of the case.

Held, allowing the application with costs:

- E (1) When the IC made its finding that the transfer of the first respondent was mala fide with the motive to punish the first respondent, it failed to consider, inter alia, that the audit report was not the reason for the first respondent's claim of constructive dismissal; that the transfer was a
- F recommendation made by the audit team for the reasons as stated in its report; whether the grounds for the recommendation made by the audit team were reasonable in the circumstances; and whether the transfer was made in the interest of the applicant as a business organisation (see para 20).
- G (2) The IC had failed to consider that a transfer is within the terms of the first respondent's terms and conditions of service. Article 2 of the first respondent's terms and conditions of employment allowed the applicant to transfer its employees between the head office and branches even without consent but subject to 'sympathetic consideration'. In the
- H present case the applicant had shown 'sympathetic consideration' towards the first respondent when it agreed to defer her transfer to a later date. In the circumstances the IC had erred when it failed to consider relevant matters and gave undue weight to irrelevant matters and in concluding that the applicant's conduct was a fundamental breach of the first
- I respondent's contract of employment (see paras 19–20 & 22).

[Bahasa Malaysia summary]

Pada 1 November 1999, kes memanipulasi dua akaun simpanan, iaitu akaun simpanan Tai Chong Realty (M) Sdn Bhd ('akaun TCR') dan akaun bersama

dan simpanan dalam nama Cheo Aimee ('responden pertama') dan emaknya, berlaku di cawangan Maybank Melaka ('pemohon'). Apabila responden pertama, pegawai bank Kelas II pemohon bank mendapati bahawa baki banknya adalah RM2,055.54 yang sepatutnya adalah RM551.68, dia melaporkan percanggahan ini kepada penolong pengurus cawangan pemohon bank. Siasatan yang dibuat menunjukkan bahawa, antara lain, bahawa dua pindahan wang tanpa kebenaran yang berjumlah kepada RM12,000 telah dibuat daripada akaun TCR dan selepas pindahan ini pengeluaran berturut-turut RM10,500 dibuat daripada akaun simpanan bersama responden pertama. Siasatan kemudiannya dijalankan oleh pasukan audit pemohon ('pasukan audit') dan keputusan surat-surat tunjuk sebab bertarikh 26 Mei 2000 dikeluarkan kepada kesemua pegawai-pegawai dan pekerja yang terlibat di dalam memanipulasi dua akaun tersebut, termasuk responden pertama. Apabila responden pertama menafikan kesemua dakwaan yang dibuat di dalam surat tunjuk sebab yang dikeluarkan kepadanya, tiada tindakan lanjut diambil terhadapnya. Walau bagaimanapun, pemohon mengeluarkan surat kepada responden pertama untuk memberitahu responden pertama mengenai pemindahan dia ke Jawatan Kawalan Kredit HP di ibu pejabat pemohon mulai dari 10 Julai 2000. Responden pertama menolak pemindahan ke jabatan lain kerana dia berpandangan bahawa pemindahan tersebut tidak dibuat untuk keperluan perniagaan atau operasi tetapi dengan tujuan kolateral yang didorong oleh penganiayaan dan untuk menghukumnya. Responden pertama juga menolak pemindahan tersebut kerana ia akan menyebabkan kesusahan. Walaupun pemohon menanggunghkan tarikh pemindahan, ia mengekalkan arahan pemindahan atas alasan bahawa ia berdasarkan cadangan pasukan audit. Responden pertama, sebaliknya, menganggap pengesahan pemindahannya sebagai tindakan pembuangan kerja konstruktif untuk menjadikan dia mangsa kerana disyaki dan dakwaan-dakwaan tersebut. Pertikaian di antara responden pertama dan pemohon dirujuk kepada Mahkamah Perusahaan ('MPH'), responden kedua, untuk penghukuman. MPH mendapati bahawa keputusan untuk memindahkan responden pertama bukan bona fide tetapi dibuat untuk menghukum responden pertama dan bahawa laporan pasukan audit adalah tidak adil dan berat sebelah. Oleh itu, melalui awardnya bertarikh 31 Mac 2009 MPH mendapati bahawa responden pertama dibuang kerja oleh pemohon tanpa sebab dan alasan yang adil dan membenarkan tuntutan untuk pengembalian kedudukan jawatan tanpa kerugian faedah kewangan. Ini adalah permohonan pemohon untuk semakan kehakiman keputusan tersebut. Melalui permohonan ini pemohon memohon perintah certiorari untuk membatalkan award tersebut. Pemohon berhujah bahawa surat tunjuk sebab yang dikeluarkan kepada responden pertama adalah sebahagian daripada proses siasatan pemohon untuk berunding dengan responden pertama sebagai peluang untuk memberikan penjelasan sebelum ia dapat memutuskan sama ada untuk mendakwanya. Ia adalah hujahan pemohon bahawa MPH telah tersilap dengan memberi perhatian lebih kepada cara di mana pasukan audit

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- A menjalankan siasatannya dalam tuduhan fraud dan gagal untuk mengambilkira perkara yang lebih relevan dalam kes ini.

Diputuskan, membenarkan permohonan dengan kos:

- B (1) Apabila MPh membuat dapatannya bahawa pemindahan responden pertama adalah mala fide dengan motif untuk menghukum responden pertama, ia gagal untuk mempertimbangkan, antara lain, bahawa laporan audit bukan sebab tuntutan responden pertama terhadap pembuangan kerja konstruktif; bahawa pemindahan tersebut adalah cadangan yang dibuat oleh pasukan audit untuk alasan-alasan yang dinyatakan dalam laporannya; sama ada alasan-alasan untuk cadangan yang dibuat oleh pasukan audit adalah munasabah dalam keadaan; dan sama ada pemindahan tersebut dibuat dalam kepentingan pemohon sebagai organisasi perniagaan (lihat perenggan 20).
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- D (2) MPh gagal untuk mempertimbangkan bahawa pemindahan adalah dalam syarat-syarat terma-terma dan syarat-syarat perkhidmatan responden pertama. Artikel 2 terma-terma dan syarat-syarat pekerjaan responden pertama membenarkan pemohon memindahkan pekerja-pekerjanya di antara ibu pejabat dan cawangan-cawangan walaupun tanpa izin tetapi tertakluk kepada 'sympathetic consideration'. Dalam kes ini pemohon telah menunjukkan 'sympathetic consideration' kepada responden pertama apabila ia bersetuju untuk menunda pemindahannya ke tarikh yang lain. Dalam keadaan ini MPh telah tersilap apabila ia gagal untuk mempertimbangkan perkara relevan dan memberi perhatian lebih kepada perkara yang tak relevan dan di dalam memutuskan bahawa tindakan pemohon adalah kemungkiran asasi kontrak pekerjaan responden pertama (lihat perenggan 19–20 & 22).]
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Notes

- G For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1037–1098.

For cases on legitimacy, see 1(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 781–787.

H Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599; [1998] 2 CLJ 197, CA (refd)

Chong Lee Fah v The New Straits Times Press (M) Bhd & Anor [2006] 1 MLJ 289; [2005] 4 CLJ 605, HC (refd)

- I *Chua Yeow Cher v Tele Dynamics Sdn Bhd* [2000] 1 MLJ 168, HC (refd)
Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors [2004] 3 MLJ 339; [2004] 2 CLJ 697, CA (refd)

Mohd Arifuddin Abdul Wahid v Asian Composites Manufacturing Sdn Bhd [2007] 4 ILR 134, IC (refd)

- Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27; [2002] 1 CLJ 181, FC (refd) A
- S Panneer Selvam Subramaniam v Dolomite Industries Co Sdn Bhd* [2008] 2 ILR 407, IC (refd)
- Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 7 MLJ 359, HC (refd) B

Legislation referred to

Evidence Act 1950 s 114(g)

Rules of the High Court 1980 O 53 C

A Ramadass (M Jothilethchimy with him) (Ramadass & Associates) for the applicant.

S Muhendaran (Muhendaran Sri) for the first respondent.

Aziah Ali J: D

INTRODUCTION

[1] The first respondent commenced employment with the applicant on 2 February 1991 as a clerk. By letter dated 23 June 2000 the applicant issued a transfer directive to the first respondent informing her of her transfer from the applicant's Melaka branch to the Credit Control HP Department at the applicant's head office with effect from 10 July 2000. The first respondent refused the transfer. The applicant maintained the transfer directive. The first respondent replied stating that upon legal advice she considered the confirmation of her transfer as an act of 'constructive dismissal' to victimise her. At the date when the first respondent claimed constructive dismissal she held the position of Officer Class II at the applicant's Melaka branch. E F

[2] In her statement of case the first respondent pleaded that the applicant had no authority to transfer her and the decision to transfer her was a fundamental breach of her employment contract. The first respondent further contended that the transfer was made not for business or operational need but with a collateral purpose to punish her and was actuated by victimisation. The reasons given by the first respondent for claiming constructive dismissal are as stated at p 7 of the award. G H

[3] By Award No 378 of 2009 dated 31 March 2009 ('the award') the Industrial Court found that the first respondent was dismissed by the applicant without just cause and excuse. Consequently the applicant's claim for reinstatement was allowed without loss of financial benefits, promotions and bonuses. By way of this application for judicial review under O 53 of the Rules of the High Court 1980 the applicant seeks for an order of certiorari to quash I

A the said award.

BACKGROUND

B [4] On 1 November 1999 a case of manipulation of two savings accounts occurred at the applicant's Melaka branch involving a housing development account belonging to Tai Chong Realty (M) Sdn Bhd and a joint savings account in the names of the first respondent and her mother. The first respondent made a balance inquiry on her joint savings account and discovered a balance of RM2,055.54 instead of RM551.68. The first respondent reported this to the assistant branch manager. Further investigations revealed two unauthorised transfers of funds amounting to RM12,000. Subsequent to the unauthorised transfers, a series of withdrawals were made from the first respondent's joint savings account.

D [5] An investigation was carried out by the applicant's audit team and as a result show cause letters dated 26 May 2000 were issued to those officers and staff involved including the first respondent. The show cause letter to the first respondent reads amongst others as follows:

E As stated in the above report, you as an officer of Melaka Branch had, arising from the fraudulent transfer of funds totaling RM12,000.00 from one (1) savings account No:188805146766 favouring Tai Chong Realty (M) Sdn Bhd to a joint savings account No: 188805130274 belonging to you and your mother, Puan Lily Tan, had become the apparent beneficiary of the funds transferred being one of the accountholders of the affected account.

F Out of the RM12,000 fraudulently transferred to your joint savings account, a total of RM10,500 was thereafter fraudulently withdrawn via ATM using a lost ATM Card and PIN number belonging to you, thereby resulting to losses of the same amount to Melaka Branch. The sequent of events and circumstances surrounding the administration of the savings and ATM cards and thereafter the fraudulent transfer and withdrawal of funds leads to the inevitable direction of your apparent involvement in the happening.

G In view of the above, you are required to explain to us as to why disciplinary action should not be taken against you. Your reply should reach us by 2 June 2000, failing which the Company shall presume that you have no reasonable explanation to offer.

H The Compny will then be at its liberty to proceed the matter with whatever means that it deems fit against you.

I [6] The officers and staff involved including the first respondent rendered their respective explanations. In her letter dated 30 May 2000 the first respondent denied the allegations against her. No further action was taken against the first respondent.

[7] The internal auditors who conducted the investigation found that

irregularities in the form of compromise of passwords opened opportunities for fraud to be committed. The auditors recommended that the branch manager and assistant branch manager, three officers and a clerk to reimburse RM12,000. It was also recommended that the applicant 'arrange for the reshuffle of the officers and staff of the branch particularly those involved in the case, in order to improve efficiency of the branch in the areas of internal control and strict compliance to procedures and prevailing practice ...' and that the branch manager and assistant branch manager be transferred immediately and similar transfers be considered for the other officers/staff involved in the case and be implemented gradually 'in order to avoid further deterioration of the situation and to cause unnecessary alarm to the other officers and staff as well as customers of the branch members of the public in general'.

[8] On 23 June 2000 the applicant issued a letter to the first respondent informing her of her transfer to the Credit Control HP Department at the applicant's head office with effect from 10 July 2000. The first respondent declined the transfer and in her letter dated 7 July 2000 she stated as follows:

I wish to refer to Article 2 on TRANSFER, in which it is stated in No 2 that for out-of-town transfers, you must either get my consent, or if consent is not given, you must give me sympathetic consideration where due hardship will be caused.

I. With reference to consent

I am still officially still under suspicion for fraud. Unless and until you first clear my name in the site concerned, I am not prepared to move to another site where no doubt, my alleged 'fraudulent' reputation would have preceded me. Even if you think that a transfer is a sensible administrative move for a suspected employee, I do not feel that it is proper for me to go elsewhere without my name being cleared first.

You have not even given me a reason why I should go to a Hire Purchase Dept in another site when my in-site experience is in Retail, Unit Trusts and Property Loans.

I deserve to be given a reason for this transfer *and* to be informed of your decision as to whether you are proceeding with disciplinary action on the Audit Report or are you clearing my name.

If you are proceeding with disciplinary action, I would rather face the music in-site where all my witnesses work rather than in a strange new place.

II. With reference to undue hardship being caused

If you had given me an opportunity to consider, I would have explained that my husband has an ailment, which though not life-threatening, certainly affects the quality of his life if not managed properly.

I am needed to take care of his diet and ensure he takes his medication.

Unless you give me a very good reason as to why a Retail/Property Loans/Unit Trusts experienced employee should be transferred to a Hire Purchase non-experienced job, I would find your directive unduly harsh in view of my husband's needs.

A In conclusion, for both the reasons outlined above, I thank you for the directive but regret that I have to decline.

B [9] The applicant replied maintaining the transfer directive but postponed the transfer date to 30 July 2000. The first respondent replied by a letter dated 28 July 2000 in which she stated:

Sir, your letter does *not* respond to the following points raised in my letter:

C (1) Article 2(2) of the General Terms and Conditions of Employment of Class II Officers

(a) Consent must be given.

I cannot consent because you have not given me the outcome of the show cause letter in which you have cast suspicion on me.

D (b) Alternatively, an opportunity to explain the undue hardship that will be caused to me must be given. You have not done that.

(2) You have not given me any reason to validate a transfer that will change my whole lifestyle. You owe me a valid reason.

E (3) You have not explained why I should go to an area of work totally strange to me.

F [10] The first respondent informed the applicant that she had sought legal advice and upon legal advice she considered the confirmation of her transfer as an act of 'constructive dismissal' to victimise her because of suspicion and allegations of fraud. The first respondent contended that instead of placing her on a disciplinary process, the applicant had chosen to 'squeeze' her out. She further stated that the fact that the Human Resource Department is ordering the transfer and not the operations bosses is proof that it was not a genuine transfer. The first respondent subsequently lodged a representation with the Industrial Relations Department and the honourable Minister referred the case to the second respondent for adjudication.

H [11] The Industrial Court was of the view that the credibility of the investigation team was very crucial to determine the validity of the audit investigation report since the first respondent's main contention is the validity of the audit investigation report. The Industrial Court did not accept the explanation given by the applicant's witness that he did not inform the first respondent of the outcome of the investigation because it had not been completed since it had been two years since the case started. Therefore the Industrial Court found that this amounts to a punishment as the first respondent did not know the finality of her explanation to the show cause letter whether she was cleared or was still being implicated. The Industrial Court was of the view that the first respondent ought to be told of the result of the

investigation to enable her to defend herself. The Industrial Court concluded that from the evidence the audit report was far from being a fair and unbiased investigation.

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[12] Counsel for the applicant submits that by going into the validity of the investigation report, the Industrial Court failed to address its mind to the pertinent fact that the first respondent was not found guilty and no disciplinary action was taken against her. Further show cause letters were issued to all the other officers/staff involved and not to the first respondent alone. The show cause letter was part of the investigation process to accord the first respondent an opportunity to provide an explanation before the applicant could decide whether there was a case to charge the first respondent. Counsel submits that the applicant ought not to be faulted for issuing the show cause letter since being a financial institution and custodian of public funds, the applicant was under a duty to investigate. In any event it is submitted that since no disciplinary action was taken at the time when the first respondent claimed constructive dismissal, the validity of the investigation report and how the investigation was conducted was not relevant.

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[13] It is submitted that since the first respondent admitted that the manner in which the investigation was conducted was not the reason for her claim of constructive dismissal, the Industrial Court erred in giving too much weight to the alleged manner in which the audit investigation was conducted. Further counsel submits that the Industrial Court erred in giving too much importance to the fact that the employees who gave statements were not called as witnesses because there was no reason for the applicant to call witnesses relating to the investigation since the first respondent was not charged. Therefore it is submitted that the Industrial Court erred in placing the burden on the applicant to call the witnesses when the burden was on the first respondent to prove her claim of constructive dismissal.

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[14] Counsel further submits that as the first respondent claimed constructive dismissal, she had to prove that the applicant was guilty of conduct which is a significant breach going to the root of her contract of employment entitling her to claim constructive dismissal (*Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 7 MLJ 359). It is submitted that the Industrial Court had failed to give due consideration to the fact that the first respondent had failed to establish based on the contract test that the applicant had committed any fundamental breach of her contract of employment (*Anwar Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599; [1998] 2 CLJ 197).

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[15] For the first respondent counsel submits that the applicant did take disciplinary action against the first respondent when it issued the baseless show

- A cause letter which culminated in the applicant's mala fide action in transferring the first respondent. Counsel submits that the disciplinary action arose out of the findings of the audit report. Counsel contends that the transfer was disciplinary action. It is submitted that it was within the purview of the Industrial Court to scrutinise the conduct and validity and credibility of the
- B audit report to ascertain whether the conduct of the applicant was in breach of natural justice and in direct breach of the first respondent's contract of employment (*Mohd Arifuddin Abdul Wahid v Asian Composites Manufacturing Sdn Bhd* [2007] 4 ILR 134; *S Panneer Selvam Subramaniam v Dolomite Industries Co Sdn Bhd* [2008] 2 ILR 407). Counsel submits that the transfer
- C was disciplinary action as outlined in article 22(a)(iii) of the first respondent's Terms and Conditions of Employment of Officers, Class II.

DECISION

- D [16] I find no merit in the contention by counsel for the first respondent that the show cause letter issued to the first respondent was baseless. The evidence show that there were valid grounds for the applicant to issue show cause letters to all the officers and staff including the first respondent. I agree with counsel
- E for the applicant that the show cause letters were issued to get their explanations for the applicant's consideration whether to pursue further disciplinary action. As submitted for the applicant, no further steps were taken in respect of disciplinary proceedings and any further action could not have been taken since the first respondent claimed constructive dismissal.
- F [17] The Industrial Court found that the audit report was unfair and biased, that it was shabby and prejudiced. The Industrial Court accepted the first respondent's evidence that she was threatened by one of the auditors during the investigation because the first respondent lodged a police report and because
- G the auditor concerned did not produce the tape recording of the investigation session and also because he had not lodged a police report. The Industrial Court applied s 114(g) of the Evidence Act 1950 against the applicant despite the applicant's evidence that the applicant was not able to produce the tape recording because it was lost. I note that the Industrial Court had not made any
- H specific finding on the reason given by the applicant before applying s 114(g). The Industrial Court found that the transfer was not bona fide but was effected for an indirect motive to punish and victimise the first respondent since the audit team failed to get an admission from the first respondent. There was no evidence that the transfer was for urgent operational need. According to the
- I Industrial Court the last option was to transfer the first respondent as punishment since the applicant could not charge her for the alleged fraud. The suffering from the transfer would put pressure on the first respondent to leave and according to the Industrial Court, it was expected by the applicant that the first respondent would leave.

[18] It is trite that transfer is a managerial prerogative and, unless the transfer is not bona fide, the refusal to proceed upon being issued with a transfer order is tantamount to insubordination which warrants dismissal (*Chua Yeow Cher v Tele Dynamics Sdn Bhd* [2000] 1 MLJ 168; *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27; [2002] 1 CLJ 181). In *Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors* [2004] 3 MLJ 339; [2004] 2 CLJ 697 the Court of Appeal said, inter alia:

Nevertheless, an employer always has the implied right to transfer its employees. As the right is one that is 'implied', no express term in the contract of service is necessary. The right to transfer exists even in the absence of a contract of service unless there is a contract to the contrary. The transfer, however, must not be actuated by mala fide or any improper or indirect motive and must not involve a change in the terms of employment to the detriment of the employee.

... we are of the view that, on conditions that the employer has acted bona fide and in the interest of its business and is not actuated by any indirect motive or any kind of mala fide, the right to transfer is an implied right of the employer.

[19] Article 2 of the General Terms and Conditions of Employment of Class II Officers applicable to the first respondent states as follows:

ARTICLE 2—TRANSFER

- (1) Transfers of officers between departments within the Head Office or a Branch and transfers between the Head Office and Branches and vice-versa and between Branches of the Company within the same city or town may be made by the Company at any time at its sole discretion.
- (2) Where it is necessary to transfer any officer to another city or town, other than with the consent of the officer, such transfer will not be carried out without the Company giving sympathetic consideration to cases where undue hardship will be caused.

PROVIDED THAT where the Company is satisfied that undue hardship will be caused, then the transfer of the officer concerned shall not be carried out without the officer being given a reasonable period of time to organize his affair.
- (3) For married officers who shift his residence/home base and family shall be granted 4 days unrecorded leave to attend to matters which may arise as a result of his transfer.

[20] I find that the Industrial Court has failed to consider the fact that the transfer was a recommendation made by the audit team for reasons stated in the report. The findings in the audit report were not challenged. I find that the Industrial Court in making its finding that the transfer of the first respondent

- A was mala fide with the motive to punish the first respondent, had failed to consider the following matters:
- (a) that the audit report was not the reason for the first respondent's claim of constructive dismissal;
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- (b) whether the recommendation and the grounds for the recommendation made by the auditors were reasonable in the circumstances;
 - (c) that the recommendation that officers and staff be reshuffled was made in respect of all the officers and staff involved and not solely against the first respondent;
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- (d) that both the branch manager and the assistant branch manager were recommended to be transferred with immediate effect;
 - (e) that recommendation was made for the branch manager, assistant branch manager and three employees to reimburse the applicant for the monies lost;
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- (f) that article 2 of the first respondent's Terms and Conditions of Employment allows the applicant to transfer its employees between the head office and branches even without consent but subject to 'sympathetic consideration';
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- (g) whether the transfer was a decision made in the interest of the applicant as a business organisation; and
 - (h) that pursuant to the first respondent's letter the applicant agreed to postpone the effective date of the transfer despite no evidence produced that her husband was suffering from an ailment.
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[21] I find that the Industrial Court has failed to consider that a transfer is within the terms of the first respondent's terms and conditions of service. In the case of *Chong Lee Fah v The New Straits Times Press (M) Bhd & Anor* [2006] 1 MLJ 289; [2005] 4 CLJ 605, Raus Sharif J (as he then was) said:

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- It is an acceptable principle that the right to transfer an employee from one department to another and from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management. In fact this right of transfer is embodied in the Industrial Relation Act 1967, where s 13 provides that a company has the right to transfer its employees within the organisation so long as such transfer does not entail a change to the detriment of an employee in regard to the terms of employment.

[22] The applicant has shown 'sympathetic consideration' towards the first respondent by agreeing to defer her transfer to a later date. I agree with the applicant that the Industrial Court had erred when it failed to consider relevant matters and had given undue weight to irrelevant matters in making its

conclusion that the applicant’s conduct was a fundamental breach of the first respondent’s contract of employment. I am of the view that a reasonable tribunal similarly circumstanced would not have arrived at the conclusion that the Industrial Court did. For the reasons stated I allowed the application with costs of RM4,000 to the applicant.

Application allowed with costs.

Reported by Kohila Nesan

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